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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JEREMY JAY-ANTHONY KEKAHUNA,

Defendant and Appellant.

C070400

(Super. Ct. No. 10F06684)

A jury found defendant Jeremy Jay-Anthony Kekahuna guilty of attempted robbery, simple battery, and resisting a peace officer. Defendant later admitted to serving a prior prison term and was sentenced to an aggregate term of four years in state prison.

On appeal, defendant contends the trial court failed to advise him of his rights prior to his admission of a prior prison term. The Attorney General concedes the error and agrees the matter should be remanded. We accept the concession. Accordingly, we strike the trial court's finding that defendant previously served a prison term and remand to allow the trial court to determine the truth of the allegations and for resentencing.

DISCUSSION¹

A criminal defendant's plea of guilty amounts to a waiver of three constitutional rights: (1) the privilege against self-incrimination; (2) the right to a trial by jury; and (3) the right to confront one's accusers. Accordingly, the trial court must advise a defendant of these rights and obtain his or her waiver of each right before taking such a plea. (*Boykin v. Alabama* (1969) 395 U.S. 238, 243 (*Boykin*) [23 L.Ed.2d 274, 279]; *In re Tahl* (1969) 1 Cal.3d 122, 132 (*Tahl*) ["each of the three rights mentioned — self-incrimination, confrontation, and jury trial — must be specifically and expressly enumerated for the benefit of and waived by the accused prior to acceptance of his guilty plea"].) For a waiver of these constitutional rights to be valid, it must be knowing, intelligent, and voluntary. (*Boykin, supra*, 395 U.S. at p. 243.)

In California, the *Boykin-Tahl* advisements must also be given before the trial court may accept a criminal defendant's admission that he or she has prior felony convictions. (*In re Yurko* (1974) 10 Cal.3d 857, 863.) "As an accused is entitled to a trial on the factual issues raised by a denial of the allegation of prior convictions, an admission of the truth of the allegation necessitates a waiver of the same constitutional rights as in the case of a plea of guilty." (*Ibid.*) The trial court must also advise such a defendant of "the full penal effect of a finding of the truth of an allegation of prior convictions." (*Id.* at p. 865.)

The lack of express advisement, and waiver, of each of the *Boykin-Tahl* rights constitutes reversible error unless "the record affirmatively shows that [the admission] is voluntary and intelligent under the totality of the circumstances." (*People v. Howard* (1992) 1 Cal.4th 1132, 1175; *People v. Mosby* (2004) 33 Cal.4th 353, 360 (*Mosby*).)

¹ The underlying facts of defendant's crime are not germane to the issue on appeal. Accordingly, we omit them from this opinion.

In *Mosby*, *supra*, 33 Cal.4th 353, our Supreme Court drew a distinction between “silent-record cases” and cases of “[i]ncomplete advisement of *Boykin-Tahl* rights.” (*Id.* at pp. 361-363.) In the former situation, the record reveals “no express advisement and waiver of the *Boykin-Tahl* rights before a defendant’s admission of a prior conviction.” (*Id.* at p. 361.) “In such cases, in which the defendant was not advised of the right to have a trial on an alleged prior conviction, we cannot infer that in admitting the prior the defendant has knowingly and intelligently waived that right as well as the associated rights to silence and confrontation of witnesses.” (*Id.* at p. 362.) In the incomplete advisement situation, the defendant is advised of the right to have a trial on the alleged prior conviction, but not the privilege against self-incrimination or the right to confront witnesses. It is in these cases that we “must examine the record of ‘the entire proceeding’ to assess whether the defendant’s admission of the prior conviction was intelligent and voluntary in light of the totality of circumstances.” (*Id.* at p. 361.)

Defendant contends it cannot be shown that he was aware of his *Boykin-Tahl* rights because the record contains “no advisement and waiver of rights before [he] admitted to the allegation of a prior prison term.” The Attorney General concedes the error. We accept the concession.

The record does not contain any advisement or waiver of defendant’s *Boykin-Tahl* rights prior to his admission of the prior prison term allegation. Because this is a silent-record case, we do not examine the record to determine whether a defendant’s admission of a prior conviction was intelligent and voluntary in light of the totality of circumstances. (*Mosby*, *supra*, 33 Cal.4th at p. 361.) In a silent-record case, we cannot infer whether a defendant has intelligently and knowingly waived his rights, and must remand the matter to the trial court for retrial on the prior convictions. (*Monge v. California* (1998) 524 U.S. 721 [141 L.Ed.2d 615]; *People v. Monge* (1997) 16 Cal.4th 826; *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1421; *People v. Fielder* (2004) 114 Cal.App.4th 1221, 1234.)

Here, we must remand the matter to the trial court for retrial on the prior prison term allegations.

DISPOSITION

The convictions are affirmed. The trial court's finding that defendant previously served a prison term is stricken and the matter is remanded for the sole purpose of allowing the trial court to determine the truth of the allegations and for resentencing. If the People do not initiate proceedings on the enhancement allegation within 60 days after the filing of the remittitur in the trial court, the trial court shall proceed as if the remittitur constituted a modification of the judgment striking the finding that defendant previously served a prison term and shall resentence defendant accordingly.

HOCH, J.

We concur:

ROBIE, Acting P. J.

BUTZ, J.